A

TENAGA NASIONAL BHD v. BRIGHT RIMS MANUFACTURING SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
BALIA YUSOF WAHI JCA
B TENGKU MAIMUN JCA
[CIVIL APPEAL NO: W-02-472-2011]
2 JANUARY 2015

C ***UTILITIES:*** *Electricity – Usage – Tampering of electricity meter – Demand for payment of sums backbilled not met – Claim for computed loss of revenue – Disparity between initial computed loss and sum re-computed during trial – Whether re-computed sum accurate – Whether there was manifest error – Whether amount claimed had to be proved upon balance of probabilities*

D The appellant had inspected the installation of the electricity meter at the respondent's premises and discovered that there had been tampering of the said meter. When demands for payment for the sums backbilled were not met, the appellant proceeded to file an action against the respondent. Initially, the computed loss of revenue due to the respondent's meter-tampering was RM2,363,781.10 but upon the suggestion of the High Court E to remove public holidays and Sundays, the amount re-computed at the trial was RM2,031,328.60. The respondent argued that the re-computed amount was still inaccurate. In cross examination, the plaintiff's witness ('PW3') agreed that between the dates of 8 May 2006 and 16 May 2006, the factory only operated in the morning and was shut down for night shift. The court F found that despite this, PW3 did not make any changes to the corrected graph. The High Court dismissed the appellant's claim on the ground that the re-computed amount did not take into account the dates where the factory was not operating to its fullest capacity. The High Court further held that the respondent had proved upon a balance of probabilities that there was a G manifest error of the amount claimed. Hence, the present appeal.

Held (allowing appeal; setting aside order of High Court)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) The reasoning that the respondent had proved a manifest error upon a balance of probabilities was flawed. It was the amount claimed that had H to be proved upon a balance of probabilities. A claim for backbilled sums due to meter-tampering is necessarily based upon an estimate and that estimate is accepted unless it is demonstrated that there is manifest error. It is a question of whether there was a manifest error. That there is upon a balance of probabilities a manifest error is insufficient to I elevate conjecture to a demonstration of manifest error. (para 15)

(2) The cross examination of PW3 merely elicited the shortcomings but did not go on to establish how that shortcoming amounted to. However, the High Court ignored that except for the shortcomings where on certain

days the estimates erred, the whole estimated sum of RM2,031,328.60 was rejected *in toto*. There was a failure to appreciate not only that the major part of the estimate was not shown to be incorrect but also that the alleged inaccuracy was not quantified so that the estimate could be further adjusted to arrive at the amount that could be claimed. (para 17)

(3) Although it was not for the court to calculate the correct amount for an order, it was also not for the appellant or the respondent to establish by how much the estimate was to be corrected. The respondent did not elicit from PW3 what the adjustment should be for those days where the factory was not working full time or night shifts. There was no reason to deny an order for the RM2,031,328.60 as claimed. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah memeriksa pemasangan meter elektrik di premis responden dan mendapati bahawa terdapat usikan pada meter tersebut. Apabila tuntutan bagi bayaran jumlah bil kebelakangan tidak dipenuhi, perayu meneruskan dengan memfailkan tindakan terhadap responden. Pada asalnya, jumlah kehilangan pendapatan yang dikira akibat usikan responden adalah RM2,363,781.10 tetapi atas cadangan Mahkamah Tinggi untuk menolak cuti awam dan hari Ahad, jumlah yang dikira semula semasa perbicaraan adalah RM2,031,328.60. Responden menghujahkan bahawa jumlah yang dikira semula masih lagi tidak tepat. Dalam pemeriksaan balas, saksi plaintif ('PW3') bersetuju bahawa antara tarikh 8 Mei 2006 dan 16 Mei 2006, kilang hanya beroperasi pada waktu pagi dan ditutup bagi syif malam. Mahkamah mendapati bahawa walau bagaimanapun, PW3 tidak membuat sebarang penukaran pada graf yang dibetulkan. Mahkamah Tinggi menolak tuntutan perayu atas alasan bahawa jumlah yang dikira semula tidak mengambil kira tarikh-tarikh dalam mana kilang tidak beroperasi pada kapasiti penuh. Mahkamah seterusnya memutuskan bahawa responden telah membuktikan atas imbangan kebarangkalian bahawa terdapat kekhilafan nyata pada jumlah yang dituntut. Oleh itu, rayuan ini.

Diputuskan (menolak rayuan; mengetepikan perintah Mahkamah Tinggi) Oleh Abdul Wahab Patail HMR menolak penghakiman mahkamah:

(1) Alasan bahawa responden telah membuktikan kekhilafan nyata atas imbangan kebarangkalian adalah cacat. Jumlah yang dikira harus dibuktikan atas imbangan kebarangkalian. Tuntutan bagi jumlah bil kebelakangan akibat usikan meter semestinya berdasarkan anggaran dan anggaran diterima melainkan ia telah terbukti bahawa terdapat kekhilafan nyata. Ia adalah persoalan sama ada terdapat kekhilafan nyata atau tidak. Bahawa terdapatnya kekhilafan nyata atas imbangan kebarangkalian tidak cukup untuk membangkitkan tekaan hingga membuktikan kekhilafan nyata.

A **(2)** Pemeriksaan balas PW3 sekadar menunjukkan kekurangan tetapi tidak membuktikan bagaimana kekurangan tersebut terjumlah. Walau bagaimanapun, Mahkamah Tinggi tidak mengendahkan bahawa melainkan kekurangan tersebut yang mana terdapat hari-hari yang anggaran yang khilaf, keseluruhan jumlah anggaran sebanyak
B RM2,031,328.60 ditolak bulat-bulat. Terdapat kegagalan untuk mempertimbangkan bahawa bukan sahaja sebahagian besar anggaran tersebut tidak dibuktikan salah tetapi juga bahawa dakwaan ketidaktepatan tersebut tidak dijumlahkan agar anggaran boleh dilaraskan bagi mendapatkan jumlah yang boleh dituntut.

C **(3)** Walaupun bukan untuk mahkamah mengira jumlah yang sebenar bagi perintah, ia juga bukan untuk perayu atau responden untuk menetapkan berapa banyak anggaran yang perlu diperbetulkan. Responden tidak mendapatkan daripada PW3 penyelarasan yang sepatutnya bagi hari-hari di mana kilang tidak beroperasi penuh masa atau syif-syif malam. Tiada
D alasan untuk menolak perintah bagi RM2,031,328.60 seperti yang dituntut.

Legislation referred to:
Electricity Supply Act 1990, ss. 38(3), (4), (5)

For the appellant – Steven Thiru (David Mathew & Ashmadi Othman with him); M/s Che
E *Mokhtar & Ling*
For the respondent – Nora Saman; M/s Nora Saman & Assocs

[Editor's note: For the High Court judgment, please see Tenaga Nasional Berhad v. Bright Rims Manufacturing Sdn Bhd [2011] 1 LNS 45 (overruled).]

F *Reported by Najib Tamby*

JUDGMENT

Abdul Wahab Patail JCA:

G **[1]** The appellant TNB appealed to this court as to whether it is entitled to recover from the respondent Bright Rims Manufacturing Sdn. Bhd. the loss of revenue estimated to be RM2,031,328.60 due to meter tampering pursuant to ss. 38(3), (4) and (5) of the Electricity Supply Act 1990 ("the Act").

[2] The respondent is, at all material times, the customer of the appellant
H and having a user account no. 012100200171 for its premises at Lot 9641, Jalan Desa Aman 13, Batu 11, Jalan Kuala Selangor, 47000 Desa Aman, Sungai Buloh, Selangor Darul Ehsan for electricity supply.

[3] The appellant's investigation team together with the officers of the Energy Commission (Suruhanjaya Tenaga) inspected the installation of the
I electricity meter at the respondent's premises on 15 May 2008 at 11.10pm and found that there had been tampering of the meter. It was not disputed that the respondent tampered with the meter and therefore liability cannot be denied.

[4] When demands for payment for the sums backbilled were not met, the appellant filed civil proceedings against the respondent on 26 May 2009. The full trial was held on 25 to 26 October 2010.

[5] Although the High Court found that the appellant had the right to claim against the respondent for the losses incurred due to the tampering of the meter, the High Court dismissed the appellant's claim and ordered the parties to bear their own costs.

[6] The reasons concerned the computation of the amount recoverable:

(i) TNB initially computed the loss of revenue due to the respondent's meter tampering to be RM2,363,781.10; and

(ii) The amount was re-computed at the trial at the suggestion of the High Court "to remove cuti awam dan hari Ahad apabila kilang telah tidak beroperasi atau beroperasi bukan dengan penuh kapasiti". The sum then arrived at was RM2,031,328.60.

[7] It was the respondent's argument that the backbill of RM2,031,328.60 was still inaccurate.

[8] It was submitted that the High Court dismissed the claim because of the following finding:

> Walaupun P8 memang lebih tepat dari P6, ia masih tidak mengambilkira tarikh-tarikh dimana kilang tidak beroperasi dengan kapasiti penuh. Ini boleh dilihat dari pemeriksaan balas PW3 berkaitan corrected graph untuk Mei 2006. PW3 telah setuju bahawa pada 8 Mei 2006 sehingga 16 Mei 2006, kilang hanya beroperasi siang dan telah tutup untuk shif malam. Perlu diingatkan tahun 2006 adalah pada masa kemelesetan ekonomi dan penutupan shif malam merupakan satu perkara yang biasa pada masa itu. Walaubagaimana pun, PW3 tidak membuat sebarang perubahan kepada corrected graph dalam P6 untuk mengambilkira shut down untuk shif malam. Beliau mengakui tidak membuat perubahan walaupun telah sedar tentang kesilapan di P6 dan P4. Bila ditanya mengapa beliau tidak buat perubahan walaupun diberi peluang untuk berbuat demikian, beliau telah memberi jawapan berikut:
>
> > kerana kadar kW yang diukur di dalam original graph telah secara otomatik mengukur kW yang sebenar keseluruhan kilang
>
> Mahkamah mendapati jawapan ini tidak dapat difahami dan langsung tidak membantu mahkamah.

[9] Examination of the grounds of decision ('the grounds') shows that the above was para. 66 of the grounds. It was after a summation of:

(i) The appellant's witnesses' testimonies:

(a) Zulkiflee bin Umar (PW1), a "Pengawalselia" in the "Jabatan Keselamatan dan Pembekalan Gas" of the Suruhanjaya Tenaga;

(b) Kong Shyang Yan (PW2) the "Jurutera Penjangkaan" in the "Perkhidmatan Penjangkaan Bahagian Pembahagian" of the appellant;

(c) Anuar bin Hanafiah (PW3) the "Pengurus Kanan (Seal VT)" in the "Jabatan Peningkatan Hasil" of the appellant; and

(d) Mahsan bin Daud (PW4), a "Pengurus Kawasan" of the appellant.

(ii) The respondent's witnesses' testimonies:

(a) Sri Ram Muthukrishnan (DW1), the Technical Director of the respondent; and

(b) Liew Li Chien (DW2), the "Pengurus Sumber Manusia" and a director of the respondent.

(iii) Evaluation and findings; and

(iv) Conclusion.

[10] In the evaluation and findings, the High Court considered these questions:

(i) Paras. 39 to 40: Adakah plaintif pemegang lesen di bawah Akta Bekal Elektrik 1990?

(ii) Paras. 41 to 48: Adakah pengusikan meter oleh defendan dibuktikan?

(iii) Paras. 49 to 51: Siapa yang perlu membayar jumlah yang tidak dibilkan?

(iv) Paras. 52 to 53: Penyata oleh kakitangan licensee menjadi keterangan *prima facie*.

(v) Paras. 54 to 67: Bolehkah backbilling summary (P4) & monthly backbilling (P6) diterima?

[11] The finding at para. 66 of the grounds was explained in paras. 67 and 68 as follows:

> 67. Mahkamah telah meneliti D2 dan mendapati banyak hari dimana kilang tidak beroperasi langsung untuk shif malam. Terdapat juga hari dimana hanya satu bahagian beroperasi shif malam dan dua bahagian lain telah tutup. Memandangkan hal keadaan ini, mahkamah mendapati bahawa defendan telah berjaya membuktikan kedua-dua P6 dan P8 tidak betul dan justeru itu P4 dan P9 juga tidak betul. Mahkamah mendapati bahawa defendan telah berjaya membuktikan, atas imbangan kebarangkalian, bahawa terdapat manifest error atas P6 dan P8, dan juga P4 dan P9. Mahkamah tidak dapat dan tidak patut masuk ke dalam arena untuk cuba mengira apakah jumlah penggunaan tenaga elektrik yang tidak dibilkan kepada defendan. Justeru itu, mahkamah mendapati bahawa plaintif tidak berjaya membutikan kesnya terhadap defendan atas imbangan kebarangkalian.

Kesimpulan

68. Berdasarkan alasan-alasan seperti tersebut di atas, mahkamah mendapati bahawa plaintif telah tidak berjaya membuktikan kesnya terhadap defendan atas imbangan kebarangkalian. Justeru itu, kes plaintif dengan ini ditolak. Berkaitan dengan isu kos, memandangkan mahkamah telah mendapati bahawa memang terdapat pengusikan meter oleh defendan walaupun plaintif tidak dapat membuktikan kesnya untuk jumlah yang dituntut, mahkamah, dengan menggunakan budibicaranya, membuat perintah supaya kedua-dua pihak menanggung kos mereka masing-masing.

[12] On the face of it, the grounds of decision considered the evidence for both parties before proceeding to make a finding that the respondent did tamper with the electricity meter. This was taken into consideration when the High Court ordered the respondent to bear its own costs even though the High Court dismissed the appellants' claim.

[13] We examined the reasoning for rejecting the claim for the backbilled amount, that the respondent had proved upon a balance of probabilities that there was manifest error in the estimates at P6 and P8 and also P4 and P9.

[14] An objective appreciation of the amount claimed based upon an estimate necessarily requires consideration from the correct perspective. That parliament provided by legislation for claims arising from tampered meters means that parliament reflects the public concern that the selfish acts of those who tamper with the meters inevitably makes the cost of electricity supply more expensive to the public. It is also obvious where a meter is tampered with, there is left no accurate metering of the electricity consumed. To require of the estimate to prove the amount claimed upon a balance of probabilities defeats the acceptance that it may be proved by an estimate. Herein lies the sting: to require too high a standard of proof defeats the estimate and rewards the consumer who tampered with the meter. The wisdom of doing so is so questionable that justice cannot possibly require such a standard. The inequity is equally obvious, for such consumer comes not with clean hands. Justice must necessarily hold that in the balance of justice, it must be the consumer who tampered with the meter who must bear the risk of having to pay more rather than the licensee to take a loss not because it was unable to prove the tampering but because it could not meet the high standard required from the estimate.

[15] The reasoning that the respondent had proved a manifest error upon a balance of probabilities is equally flawed. It is the amount claimed that has to be proved upon a balance of probabilities. A claim for backbilled sums due to meter tampering is necessarily based upon an estimate. That estimate is accepted unless it is demonstrated that there is manifest error. It is a question of whether there is or there is not a manifest error. That there is upon a balance of probabilities a manifest error is insufficient to elevate conjecture to a demonstration of manifest error.

[16] We examined why the High Court considered that manifest error was proved upon a balance of probabilities. We concluded it came from the fact that the document D2 referred to in para. 67 of the grounds was produced at the trial by the witness, without the appellant having had an opportunity to check and verify it as to its accuracy. It purported to be prepared from the respondent's records of its operations. Its production was objected to. In a contest between the appellant licensee's estimate and the document generated by the consumer who tampered with the meter, the balance must favour the licensee.

[17] A further consideration is this. In para. 67 of the grounds, the High Court referred to a reply by PW3 and stated that the answer could not be understood and was of no assistance to the court. The issue raised with PW3 was his failure to make adjustments on various holidays and days when night shift was not working. The cross-examination merely elicited the shortcomings but did not go on to establish how much that shortcoming amounted to. But the High Court, ignoring that except for the shortcomings where on certain days the estimates erred, the whole estimated sum of RM2,031,328.60 was rejected *in toto*. There was a failure to appreciate not only that the major part of the estimate was not shown to be incorrect, but also the alleged inaccuracy was not quantified so that the estimate can be further adjusted to arrive at the amount that can be claimed. We accept it is not for the court to calculate the correct amount for an order, but it is equally true it is not for the appellant and respondent to establish by how much the estimate is to be corrected. The respondent not having elicited from PW3 what the adjustment should be for those days where the factory was not working full time or night shifts, there was no reason to deny an order for the RM2,031,328.60 as claimed. This is particularly so when D2 was produced only at the defence stage of the case.

[18] Accordingly, we allowed the appeal, set aside the order of the High Court and entered judgment for the plaintiff for the sum of RM2,031,328.60 with interest at 8% per annum from the date of judgment 21 January 2011 until full settlement, with costs fixed in the sum of RM15,000 here and below. In the event, we ordered that the deposit be refunded.